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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 761

NORMAN M. LITTELL, *Petitioner,*

v.

STEWART L. UDALL, *Secretary of the Interior.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

We think the Court should be aware that one of the authorities relied on by the Secretary significantly contradicts his primary contention here.

The Secretary says (Br. Op. 9) that "The activities of attorneys for Indian tribes were more recently investigated and criticized in S. Rep. No. 8, 83d Cong., 1st Sess. (1953)."

This is true enough; but the cited report of a subcommittee of the Senate Committee on Interior and Insular Affairs never indicated in any respect that the Secretary

had power on his own to cancel the previously approved contracts of attorneys for Indian tribes. Quite to the contrary, while castigating one particular attorney's conduct in severe terms, the subcommittee did not suggest or even intimate that the Secretary of the Interior should undertake administratively to suspend this attorney, much less undertake to terminate his contracts with his several Indian clients. Instead, the subcommittee said (Sen. Rep. No. 8, 83d Cong., 1st sess., p. 24):

> "The subcommittee recommends that the Attorney General, as the representative of the Government in the courts of the United States, bring Mr. Curry's conduct to the attention of those tribunals which should properly review his conduct."

This approach, that approved Indian contracts (like land patents after issuance, see *West* v. *Standard Oil Co.*, 278 U.S. 200, 210-212) can only be cancelled by suit, is plainly at variance with the proposition advanced by the Secretary here (Br. Op. 8),

> "that the general authority over Indian affairs empowers the Secretary and the Commissioner to take any appropriate action to protect the rights of Indians. There is nothing in the language or the history of the statute here involved to justify the implication of denial of a power to withdraw approval previously given and to cancel attorneys' contracts when circumstances require."

The Secretary's position in this Court, and the ruling below now sought to be reviewed, run counter to every construction of his powers over a period of more than 90 years:

(1) The legislative development of R.S. § 2103 (25 U.S.C. § 81) plainly negatives any power to cancel administratively contracts once approved under its provisions. Pet. 12-15. (2) The administrative construction of the statute

shows that the present case represents the first instance over all of those more than 90 years in which such cancellation has ever been attempted. Fdg. 43, R. 2655. (3) Congress never considered that the Secretary had any such power, as the quotation above from Sen. Rep. No. 8, 83d Cong., 1st sess., p. 24, demonstrates. (4) The record here shows that the Secretary never undertook to cancel the present contract until after petitioner refused to resign. See Fdgs. 33, 36, 38, R. 2651-53; and Dist. Ct. Op., R. 2618. (5) The court below on the first appeal, on the basis of the same authorities that the Secretary adduced on the second appeal, held that the Secretary had no such authority. 338 F. 2d at 540 and 542, quoted at Pet. 5.

As Mr. F. S. Cohen and the Interior Department have said of R.S. § 2103 (Cohen, *Handbook of Federal Indian Law* [1941] 77; U.S. Dept. Int., *Federal Indian Law* [1958] 114) "the Indians were effectually deprived by this statute of one of the most basic rights known to the common law, the right to free choice of counsel for the redress of injuries." And as government grows and expands, it becomes more than ever important that government officials be denied the power to control the selection of the lawyers who will oppose them.

In any event, it is essential that, even with power of initial approval still resting with the Secretary by virtue of the statute, his powers be not extended by unfounded implication to permit him subsequently to cancel approved contracts, particularly in the face of the uniform administrative and legislative construction to the contrary over nearly a century of day-to-day administration of such contracts.

If the decision below is permitted to stand unreviewed, it will cast a cloud on every Indian contract now in force, and will seriously curtail the rights of every Indian citizen to make binding agreements in the future, and particularly to retain counsel of his own choosing. That is the reason,

the pre-eminent reason, why the present petition for a writ of certiorari should be granted.

Respectfully submitted.

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